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BEFORE THE UTAH BOARD OF OIL, GAS AND MINING

Utah Chapter of the Sierra Club et al., *Petitioners,* vs. Utah Division of Oil, Gas and Mining, *Respondent,* *and* Alton Coal Development, LLC, *Respondent/Intervenor.*	Utah Division of Oil, Gas and Mining's Memorandum of Law re: Request for Additional Briefing on Attorney Fees Shifting Docket No. 2009-019 Cause No. C/025/005

The Utah Division of Oil, Gas and Mining submits this Memorandum of Law in response to the Utah Board of Oil, Gas and Mining's request for additional briefing in the pending attorney fees dispute between Alton Coal Development and Sierra Club et al.

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INTRODUCTION

The following Memorandum of Law responds to the Board's request for additional briefing on the issue of shifting attorney fees under Board Rule B-15(d). The Board's request followed a Division motion which sought clarification of Rule B-15's legal framework because, as an issue of first impression for the Board, there was no definitive law to apply in this case. Without a framework to apply, the parties continued to argue past each other instead of moving towards a final resolution.

This phase of the case will remedy that situation by establishing a legal framework for fee shifting that the parties can apply to the facts and the established record in this case. The Division therefore welcomes this opportunity to assist the Board in resolving this complex issue.

BACKGROUND

Course of the proceedings. The context of this dispute is a familiar one. In 2009, Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, Natural Resources Defense Council, and National Parks Conservation Association (collectively, Sierra Club) challenged the Division on a permit to mine coal issued to Alton Coal Development. Alton joined in that action as a respondent/intervenor to defend its permit and, over the next three years, that dispute wound its way from the Board to the Utah Supreme Court.

During the litigation, Sierra Club argued that Division's permit was improperly issued, but failed in its effort to have the permit set aside. The Supreme Court ultimately affirmed the Board's decision to uphold Alton's permit on all points, thus ending the merits phase of this litigation.

But even after a final decision on the merits, this dispute was far from over. In the post-merits phase, of which this briefing is part, Alton Coal seeks to recover almost $1.2 million in fees and legal costs from Sierra Club under Rule B-15(d), which provides that a permittee may recover from a challenger who sued "in bad faith for the purpose of harassing or embarrassing the permitee." Utah Board of Oil, Gas and Mining Rule B-15(d), *attached at* Ex. 1.[1] For clarity, this Memorandum often refers generally to Rule B-15, but the arguments address only subsection (d), which governs this scenario.

Based on the Rule's plain language, Alton Coal petitioned the Board to allow discovery into Sierra Club's private inner workings, hoping to find evidence showing that Sierra Club had improper motivation for filing the original claims. Alton argued that the discovery was appropriate because the fee-shifting standard in Rule B-15 is a solely subjective question of the petitioner's intent. Thus, according to Alton, discovery was necessary for it to prove Sierra Club's subjective intent.

[1] As the Board knows, due to an administrative error not relevant here, Rule B-15 does not appear in the Utah administrative code.

Sierra Club and the Division opposed Alton's one-prong interpretation of the Rule. The Board, not yet fully briefed on the issue, postponed ruling on the legal construction of B-15 presented by Sierra Club's motion to dismiss. The Board allowed discovery to proceed while it considered the correct legal standard. However, the threat of invasive discovery prompted Sierra Club to petition the Utah Supreme Court for extraordinary relief, in essence taking an interlocutory appeal from the Board Order that allowed the discovery.

While Sierra Club's petition was pending in the Supreme Court, the Board continued to consider Rule B-15's proper construction and issued a Supplemental Order. The updated order rejected Alton's one-prong interpretation of the test and articulated that Rule B-15 requires two elements, objective *and* subjective. Supplemental Order Concerning Renewed Motion for Leave to Conduct Discover – Award of Fees and Costs at 2. The Supplemental Order mooted Sierra Club's argument, and the Utah Supreme Court dismissed the Club's petition for extraordinary relief.

As a result of the Supplemental Order, Alton Coal's original theory on Rule B-15's application cannot stand. The meaning of the newly-recognized objective prong – and the legal framework for fee shifting generally – remain in contention however. To resolve those contentions, the Division moved the Board to clarify the Rule B-15 legal standard. In response, the Board requested this round of briefing to help it make a decision on this issue of first impression.

The American rule for shifting attorney fees. In the United States, a winning party is generally not entitled to collect attorney fees from the losing party. *See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). The presumption against shifting attorney fees is known as the American rule (the English rule is the opposite and routinely shifts attorney fees to the winning party). Over the years, however, state and federal legislatures have carved out statutory exceptions that provide for fee shifting. Legislators enact these exceptions to promote policy goals and encourage private litigation in accordance with those goals.

Exceptions to the American rule are common in modern policy-driven statutes and are near-universal under natural resources and environmental statutes. For instance, the Clean Air Act, the Clean Water Act, and the Surface Mining Control and Reclamation Act (SMCRA) all contain robust citizen-suit provisions, and those provisions provide for attorney-fee shifting to encourage and enable the public to help enforce the Acts.

Under SMCRA and the other resource statutes, fee shifting is asymmetrical—it is easier for a public party to obtain fees from the government than it is for the government or a permittee to receive fees from a public party. Congress built the asymmetry into SMCRA by design; it wanted to encourage enforcement of the Act by citizen attorneys general. *Bennett v. Spear*, 520 U.S. 154, 165 (1997). Board Rule B-15 duplicates the dual standard for fee shifting under the federal

SMCRA rules, and is consistent with Congress's asymmetrical fee-shifting design.

As the Congressional Research Service found, the reason for the dual standard "is that while Congress wanted to clear the way for suits to be brought under the Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis." Henry Cohen, *Awards of Attorneys' Fees by Federal Courts and Federal Agencies* 13 (Congressional Research Service 2008) (equating natural resource fee shifting with civil rights fee shifting and quoting the U.S. Supreme Court). That is, fees should commonly be awarded to petitioners in ordinary cases "to vindicate the public interest" but should only be awarded to permittees "in frivolous cases [to] discourage such suits." *Id.* Alton Coal's petition for fees arises against this backdrop. They have an uphill battle.

ARGUMENT

Although the post-merits phase of this case is facially about shifting costs from a permittee to a petitioner, the core issue in this round of briefing is a purely legal question of statutory construction. Simply put, statutory construction is the act and process of interpreting a law—but that process is often difficult (to put it simply). In this portion of the post-merits litigation, the Board is faced with one main priority: it must construct Rule B-15 in harmony with the Utah Coal Act and SMCRA, the federal law that delegated regulatory authority to Utah.

Applying the Rule to the facts of this case should wait until the Board announces the applicable legal standard.

To assist the Board with its task, this argument section proceeds in three parts. First, Part I addresses the objective portion of the B-15 test—what the Board's Supplemental Order calls "objective bad faith." Second, Part II addresses the hypothetical situation that would arise if some, but not all, of a petitioner's claims meat the objective portion of B-15. Finally, Part III concludes with a framework for how the objective and subjective portions of B-15 should work together and a brief outline of the Division's suggestion for moving forward and concluding this litigation.

I. The Board should construct Rule B-15 to mirror the fee-shifting provision in the Utah Judicial Code because incorporating an established body of law assists the Board in its duties.

Fee shifting under Rule B-15 is an issue of first impression, but that does not mean that the Board is without the guidance of Utah law on the subject. Under Utah law, the American rule prevails but attorney fees may be shifted as a sanction for attorney misconduct under Utah Rule of Civil Procedure 11, when authorized by statute, or by contract. *Faust v. KAI Technologies, Inc.*, 2000 UT 82, ¶ 17, 15 P.3d 1266 ("the rule in Utah, is that attorney fees are not recoverable by a prevailing party unless authorized by statute or contract.").

Here, neither Rule 11 nor contract law help with B-15's construction. The most analogous, and therefore most persuasive, fee shifting provision under Utah law is found in statute as part of the

Utah Judicial Code. Like Rule B-15, the Judicial Code uses an objective and subjective two-pronged analysis for fee shifting.

Under the Code, "the court shall award reasonable attorney fees to a prevailing party if the court determines that the action or defense to the action was without merit *and* not brought or asserted in good faith." Utah Code Ann. § 78B-5-825 (emphasis added). According to Utah's courts, the objective prong is satisfied when an action is "without merit"; the subjective prong is satisfied when an action is "asserted in bad faith." *See Still Standing Stable*, 2005 UT 46, ¶ 7, (emphasizing the two separate components).

It is reasonable for the Board to pattern B-15 on the Judicial Code because the purposes of the two provisions are the same. According to the Utah Supreme Court, "the reason for awarding attorney fees [under the Judicial Code] is to punish the wrongdoer, and not compensate the victim." *Id.* at ¶ 16 (quotation omitted). This is precisely the same purpose as fee shifting under SMCRA, which is meant to "discourage [frivolous] suits." Cohen, *Awards of Attorneys' Fees by Federal Courts and Federal Agencies* 13.

The Board should follow established precedent from the Judicial Code when it constructs Rule B-15, and thereby incorporate a wealth of case law on the subject, for two reasons. First, "objective bad faith" is simply the Board's terminology for the synonyms "without merit" and "frivolous" as used in statute and case law. Second, "frivolousness" and "without merit" are well-understood legal terms of art and

incorporating the existing law will benefit the Utah Coal Act and assist the Board in adjudicating disputes about attorney fees.

A. The Board should define the "objective bad faith" element of Rule B-15 to mean "frivolous" because the term "bad faith" is inherently—and exclusively—subjective.

The Division understands the Board's directive to brief "objective bad faith" as shorthand for briefing the "objective prong of the Rule B-15 test." In an effort to be clear, the Division will use either "frivolous" or "meritless" when referring to the objective potion of the Rule B-15 test. The Division urges the Board to adopt the same terminology to promote clarity.

It is true that courts and legislators often use "bad faith" generally, as a shorthand umbrella concept in the fee-shifting context. However, in its narrow sense "objective bad faith" is an ambiguous term and prone to confusion because "bad faith" is purely subjective and cannot be measured objectively. This is apparent form the plain meaning of "bad faith," which Black's defines as "dishonesty of belief, purpose, or motive." *Black's Law Dictionary* 166 (10th ed. 2014). Belief is, by its very nature, subjective and thus "bad faith" is subjective too.[2]

To avoid this ambiguity, Utah statute and case law use the term "frivolous" or "without merit" when referring to the objective element

[2] Other definitions confirm the exclusively subjective nature of bad faith. For instance, the Oxford English Dictionary defines bad faith as "intent to deceive; insincerity, dishonesty; faithlessness, disloyalty; treachery." OED Online (Dec. 2014). Intent, insincerity, and dishonesty cannot be objectively measured.

of the attorney-fee shifting test. Therefore, the Division suggests using the term "bad faith" only when referencing the subjective element of the B-15 test and to use the term "frivolous" or "without merit" when referring to the objective component. Using that terminology will help the Board do its job easily and effectively because those are the terms used by the courts, as explained below.

B. "Frivolous" is a well-understood legal term, and the Board should adopt it, along with its defining case law, from Utah's state courts.

The most sensible way to construct Rule B-15's objective prong is to do so in accordance with the vast majority of other fee-shifting statutes,[3] which require a threshold objective finding of frivolousness. Under Utah and federal law, a claim "is frivolous where it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Warner v. DMG Color, Inc.*, 2000 UT 102, ¶ 22, 20 P.3d 868 (equating "frivolous" with "having no basis in law or fact"). Further, "frivolous" and "without merit" are essentially equivalent, used interchangeably. *E.g.*, *In re Sheville*, 2003 UT App 141, ¶ 6, 71 P.3d 179 ("those claims are 'frivolous' and therefore 'without merit'").

By their definitions, both terms explain their own objectiveness. According to the Utah Court of Appeals, claims have merit if a reasonable person could believe that they have a basis in law and fact. *See Verdi Energy Grp., Inc. v. Nelson*, 2014 UT 101, ¶ 33, 326 P.3d 104.

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[3] The Division is not aware of any natural resource-related fee-shifting statutes that require only a subjective finding of bad intent.

And the reasonable person standard is always objective. *See J.D.B. v. N. Carolina*, 131 S.Ct. 2394, 2411 (2011). That is, a claim has merit not because the proponent says it does, but because reasonable third parties agree on that point. Put another way, a claim's merit is externally verifiable by outside observers, in this case the Board and other parties to the suit.

Further, merit is not measured by a claim's successfulness. In the words of the Utah Rules of Civil Procedure, "argument[s] for the extension, modification, or reversal of existing law or the establishment of new law" are not necessarily frivolous even when they do not prevail. *See* Utah R. Civ. P. 11(b)(2). Utah's rules on attorney conduct concur: "a good-faith argument for an extension, modification or reversal of existing law" is not frivolous when it loses as long as the argument has "a basis in law and fact." Utah R. Prof'l Conduct 3.1.

Constructing the objective B-15 standard in accordance with other Utah fee-shifting provisions makes sense for two reasons, efficiency and consistency. First, patterning the Rule on the Utah Judicial Code promotes administrative efficiency by giving the tribunal and the parties a well-established body of law to draw on (rather than letting the parties try to conjure new law that supports their interests, as now). Without an established precedent, this suit and future suits are likely to move forward in a rambling chaotic mess, as each nuance of a case gets fully litigated as an issue of first impression. Neither the Board nor

the Division have the time and resources to accomplish that task effectively.

Second, incorporating the Judicial Code's structure also promotes consistency. That is, it is inconsistent for two laws with the same underlying purpose—punishing parties that waste time and resources with frivolous claims—to be applied differently. Indeed, it is common sense that similar provisions of the law, even when they exist in different statutes, receive the same construction.

A well-known canon of statutory construction illustrates the point. It is known as the "prior construction canon" and is part of the group of canons meant to stabilize the law within single statutes and across different statutes. Under the prior construction canon, a law that uses words or phrases that have already been authoritatively defined by a jurisdiction's high court in one statute should be interpreted the same way in another statute. Antonin Scalia & Bryan A. Garner, *Reading Law* 322 (2012).

Here, the Utah Supreme Court has already defined "bad faith" in the attorney fees context under the Judicial Code, and it is reasonable for the Board to follow suit. Constructing the Rule this way will promote clarity and efficiency, and help the Board mediate fee disputes. For these reasons, the Division urges the Board to interpret Rule B-15(d) like the analogous provision for fee shifting under the Judicial Code.

II. The Board should determine whether individual claims qualify for attorney-fee shifting based on the facts and record of the individual case.

The Board also directed the parties to brief the question of how the Board should proceed if the objective element of B-15 can be shown for some, but not all, of the underlying merits claims. As the Division understands it, this question might be rephrased as: Are individual claims in a petition separable from the whole for the purposes of assigning attorney fees?

On the question of separability, the Division's answers this question in the affirmative. At some level, the individual claims within a larger petition should be analyzed separately. That is true because a blanket rule against separability of claims would damage the Utah coal program. Under the program, one bad claim should not insulate the government from paying the fees associated with a petitioner's good claims. Conversely, one good claim should not insulate a petitioner from paying the attorney fees associated with its bad ones.

Any other interpretation of the separability question incentivizes poor legal behavior. For instance, under an absolute bar to separability a party would be able to mask nine frivolous claims behind one meritorious one. This could lead to an explosion of frivolous litigation that wastes the Board's time and interferes with the regulatory process. Likewise, one frivolous claim cannot reasonably expose a party to attorney fee liability for the other nine meritorious claims. That rule, of

course, would have an improper chilling effect on the public's right to petition the government.

The U.S. Supreme Court made this very point recently in *Fox v. Vice*, stating that, "Some claims succeed; others fail. Some charges are frivolous; others (even if not ultimately successful) have a reasonable basis." 131 S.Ct. 2205, 2213-14 (2011).[4] The Court continued, "the presence of reasonable allegations in a suit does not immunize the plaintiff against paying for the fees that his frivolous claims imposed." *Id.* at 2214. Likewise, "Analogous principles indicate that a defendant may deserve fees even if not all the plaintiff's claims were frivolous." *Id.*

"In short, litigation is messy, and courts must deal with this untidiness in awarding fees." *Id.* As attractive as a simple blanked rule might be, the Board should retain the flexibility necessary to deal with these situations on a case-by-case basis.

III. The Board should announce the Rule B-15 legal standard and then allow the parties to amend their pleadings to conform to that standard.

The Division's proposed construction of B-15. Under the Division's suggested approach, a permittee like Alton Coal can only win an award of attorney fees if it establishes two elements. The first element

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[4] *Fox* dealt with fee shifting under civil rights statute. However, civil rights cases are applicable to the natural resource context because Congress used the same fee-shifting strategy in both. *See Bennett v. Spear*, 520 U.S. 154, 164–66 (1997) (equating the citizen enforcement provisions in the Civil Rights Act with SMCRA).

is objective, and is satisfied by a showing that a petitioner's original claim was frivolous. Because the objective element is a question of law, establishing frivolousness does not require the use of new discovery or facts outside the record. *See Still Standing Stable*, 2005 UT 46, ¶ 8. Thus, the question of frivolousness is ripe for decision on a motion to dismiss and does not require any discovery to resolve. The Board should address this question first as a matter of administrative economy.

The second element of the bad faith test "turns on a factual determination of a party's subjective intent" when it made the claim. *Id.* at ¶ 9 (quotation omitted). In Utah, courts look at three factors when determining bad faith. Those factors entail the same concepts as B-15(d) itself, and essentially ask the question of whether the petitioner intended its claim to harass or embarrass the permittee. *See id.* at ¶ 12. If a permittee proves a harassing purpose, then it has established bad faith. *Id.* As a fact-based determination, the Board may benefit from allowing limited discovery to help answer this question.

However, the Utah Supreme Court has cautioned that, just because a party filed a frivolous claim, it does not result in a presumption of bad faith. "[I]t does not follow that simply because the [petitioner] had no legal foundation to bring the action that it was also acting in bad faith." *Id.* at ¶ 11. Therefore, the burden falls on the permittee to establish both independent elements of an attorney fees claim.

A procedure for moving forward. This round of briefing addresses the wholly legal question of how to construct Rule B-15. Also, the

Board's Supplemental Order, in a way, disposed of Alton Coal's original petition for fees because Alton's theory was based on a single-element subjective test. Therefore, this Division suggests this procedural framework for moving forward.

First, the Board should announce the proper construction and interpretation of Rule B-15. Then, the Board should ask Alton to file an amended petition for fees tailored to the newly-announced test. Alton's amended petition, if any, would probably need to address the frivolousness of individual claims from Sierra Club's original 2009 action. Sierra Club then would renew its motion to dismiss, presumably arguing that the challenged claims were meritorious and therefore not open to fee shifting.

The Board, using the petition for fees, the motion to dismiss briefing, and the established record, could then render a decision on the purely legal threshold question of frivolousness. If any portion of Alton's petition for fees survived the motion to dismiss, the Board could entertain discover requests at that time.

CONCLUSION

For these reasons, the Division urges the Board to construct Rule B-15 to mirror the attorney fees provision of the Utah Judicial Code. Doing so will make the Board's job easier by promoting clarity and efficiency—it makes sense that similar provisions in Utah law be applied in the same way. Doing so will also benefit the parties by narrowing the scope of the argument and giving them an established

framework in which to work. Finally, doing so will strengthen the Utah Coal Act and facilitate a swift(er) resolution to this case.

Dated on January 12, 2015.

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CERTIFICATE OF SERVICE

I certify that I delivered a true and correct copy of the Utah Division of Oil, Gas and Mining's Response to Sierra Club's Petition for Extraordinary Relief to the following parties.

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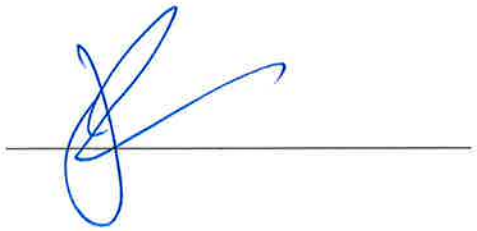

EXHIBIT 1

Utah Board of Oil, Gas and Mining Rule B-15

Rule B-15

This provision adopts the provisions for payment of Attorneys fees set forth at 43 CFR 4.12, 90-1296.

State Comment:

The Board Rules as amended incorporate the requirements of 43 CFR 4 and adopt adjudicatory procedures equally as stringent as 5 USC 544. Notice of hearing in a timely manner, persons of the time, place and nature of the proceeding are required by the Board Rules (See 5 USC 554(b)). An opportunity for hearing on the part of all interested parties is also provided (See 5 USC 544(c)). Provisions governing expert communication and unbiased proceedings are ensured by the conflict of interest provisions set forth at UMC and SMC 705.

Legislative proceedings before the Board follow the same rules of practice and procedure except that there is no cross-examination of witnesses and testimony is presented in an informal manner without administration of an oath.

Rule B-15

PETITONS FOR AWARD OF COSTS AND EXPENSES UNDER SECTION 40-10-22(3)(E) OF THE ACT.

(a) Who may file. Any person may file a petition for award of costs and expenses including attorneys' fees reasonably incurred as a result of that person's participation in any administrative proceeding under the Act which results in-

(1) A final order being issued by the Board.

Where to file; time for filing. The petition for an award of costs and expenses including attorneys' fees must be filed with the Board, within 45 days of receipt of such order. Failure to make a timely filing of the petition may conssitute a waiver of the right to such an award.

Contents of petition.

(a) A petition filed under this section shall include the name of the person from whom costs and expenses are sought and the following shall be submitted in support of the petition-

(1) An affidavit setting forth in detail all costs and expenses including attorneys' fees reasonably incurred for, or in connection with the person's participation in the proceeding;

(2) Receipts or other evidence of such costs and expenses; and

(3) Where attorneys' fees are claimed, evidence concerning the hours expended on the case, the customary commercial rate of payment for such services in the area, the the experience, reputation and ability of the individual or individuals performing the services.

Answer. Any person served with a copy of the petition shall have 30 days from service of the petition within which to file an answer to such petition.

Who may receive an award. Appropriate costs and expenses including attorneys' fees may be awarded-

(a) To any person from the permittee, if-

(1) The person initiates any adminiatrative proceedings reviewing enforcement proceedings reviewing enforcement actions, upon a finding that a violation of the Act, regulations or permit has occurred, or that an imminent hazard existed, or to any person who participates in an enforcement proceeding where such a finding is made if the Board determines that the person made a substantial contribution to the full and fair determination of the issues; or

(2) The person initiates an application for review of alleged discriminatory acts, upon a finding of discriminatory discharge or other acts of discrimination.

(b) To any person other than a permittee or his representative from the Division if the person initiates or participates in any proceeding under the Act upon a finding that the person made a substantial contribution to a full and fair determination of the issues.

(c) To a permittee from the Division when the permittee demonstrates that the Board or Division issued an order of cessation, a notice of violation or an order to show cause why a permit should not be suspended or revoked, in bad faith and for the purpose of harassing or embarrassing the permittee; or

(d) To a permittee from any person where the permittee demonstrates that the person initiated a proceeding under section 40-10-22 of the Act or participated in such a proceeding in bad faith for the purpose of harassing or embarrassing the permittee.

(e) To the Division where it demonstrates that any person applied for review pursuant to section 40-10-22 of the Act or that any party participated in such a proceeding in bad faith and for the purpose of harassing or embarrissing the Government.

Awards. An award under these sections may include-

(a) All costs and expenses, including attorneys' fees and expert witness fees, reasonably incurred as a result of initiation and/or participation in a proceeding under the Act; and

(b) All costs and expenses, including attorneys' fees and expert witness fees, reasonably incurred in seeking the award before the Board.

Appeals. Any person aggrieved by a decision concerning the award of costs and expenses in an administrative proceeding under this Act may appeal such award to a court of appropriate jurisdiction.

Note: On November 19, 1980 the Board of Oil, Gas and Mining passed a motion to affirmatively disapprove all provisions of the State regulations for which equivalent federal regulations were suspended or remanded by the U.S. District Court of Columbia, Judge Flannery in Inre: Permanent Surface Mining Regulation Litigation (C-79-1144, Feb. 26, May 16, Aug. 15, 1980.)